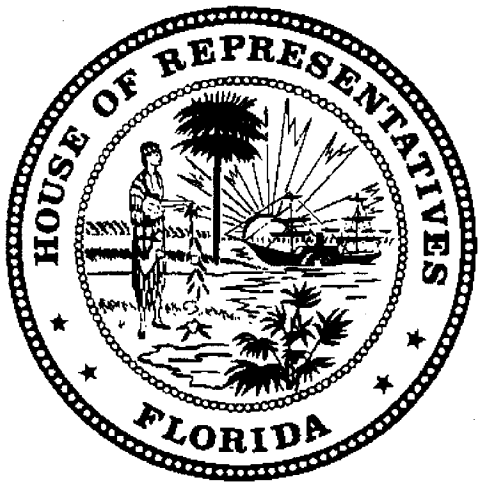


# Governmental Operations Committee

## Wednesday, October 19, 2005
## 2:00 – 4:00 PM
## Morris Hall

Allan Bense
Speaker

Jeff Kottkamp
Chairman

# Committee Meeting Notice

## HOUSE OF REPRESENTATIVES

**Speaker Allan G. Bense**

**(AMENDED 10/7/2005 2:02:44PM)**

**Amended(1)**

## Governmental Operations Committee

| | |
|---|---|
| **Start Date and Time:** | Wednesday, October 19, 2005 02:00 pm |
| **End Date and Time:** | Wednesday, October 19, 2005 04:00 pm |
| **Location:** | Morris Hall (17 HOB) |
| **Duration:** | 2.00 hrs |

**Consideration of the following bill(s):**

HB 61 Postsentencing DNA Testing by Quinones
HJR 63 Real Property Rights of Aliens Ineligible for Citizenship by Brutus
HB 143 Retirement by Brummer

**NOTICE FINALIZED on 10/07/2005 14:02 by TUCK.SHIRLEY**

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 61 Postsentencing DNA Testing
**SPONSOR(S):** Quinones and others
**TIED BILLS:** None **IDEN./SIM. BILLS:** None

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Governmental Operations Committee | | Williamson | Everhart |
| 2) Criminal Justice Committee | | | |
| 3) Justice Appropriations Committee | | | |
| 4) State Administration Council | | | |
| 5) | | | |

## SUMMARY ANALYSIS

Current law provided a four-year window for a convicted person claiming innocence to file a postconviction motion seeking the testing of DNA evidence. The four-year window expired October 1, 2005.

The bill removes the four-year time limitation. In addition, the bill requires the maintenance of physical evidence until the defendant's sentence is completed.

The application of the bill's provisions is made retroactive to September 30, 2005.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

**Provide limited government** – The bill requires governmental entities to maintain physical evidence for a longer period of time.

**Safeguard individual liberty** – The bill allows a person who has maintained his or her innocence to file a petition for postconviction DNA testing without worrying about meeting a deadline for filing the motion.

B. EFFECT OF PROPOSED CHANGES:

**EFFECT OF BILL**

The bill deletes the time period for filing petitions for postconviction DNA (deoxyribonucleic acid) testing. Current law provides a four-year window for a person who has maintained his or her innocence to file a postconviction motion seeking the testing of DNA evidence. The four-year window expired October 1, 2005.

In addition, the bill requires physical evidence to be maintained until the defendant's sentence has been completed, unless certain requirements are met for early disposal. The bill makes conforming changes.

The application of the bill's provisions is made retroactive to September 30, 2005.

**BACKGROUND**

**GENERAL BACKGROUND**

The legislature first addressed the issue of postconviction DNA testing in 2001. It gave a person, convicted at trial and sentenced, a statutory right to petition for postconviction DNA testing of physical evidence collected at the time of the crime. This right is based on the assertion that the DNA test results could exonerate that person or alternatively reduce the sentence.[1] In order to petition the court, the person must:

- Be convicted at trial and sentenced;
- Show that his or her identity was a genuinely disputed issue in the case and why;
- Claim to be innocent; and
- Meet the reasonable probability standard that the person would have been acquitted or received a lesser sentence if the DNA testing had been done at the time of trial or done at the time of the petition under the evolving forensic DNA testing technologies.

If the trial court determines that the facts are sufficiently alleged, the state attorney is required to respond within 30 days pursuant to court order. The trial court must make a determination based on a finding of whether:

- The physical evidence that may contain DNA still exists;
- The results of DNA testing of that evidence would have been admissible at trial;
- There is reliable proof that the evidence has not been materially altered and would be admissible at a future hearing; and

[1] *See* ch. 2001-97, L.O.F.; ss. 925.11 and 943.3251, F.S.

- A reasonable probability exists that the defendant would have been acquitted of the crime or received a lesser sentence if DNA test results had been admitted at trial.

If the court denies the petition for DNA testing, a motion for rehearing must be filed within 15 days of the order and the 30-day period for filing an appeal is tolled until the court rules on the motion. Otherwise, either party has 30 days to file an appeal of the ruling. The order denying relief must include notice of these time limitations. If the court grants the petition for DNA testing, the defendant is assessed the cost of the DNA testing, unless the court finds that the defendant is otherwise indigent. The Florida Department of Law Enforcement (FDLE) performs the DNA test pursuant to court order.[2] The DNA test results are provided to the court, the defendant, and the prosecuting authority.

**CURRENT TIME LIMITATIONS**

Current law imposes a four-year period for filing such petitions. The time limitation is measured from the later of the following dates based on the law's effective date of October 1, 2003:

- Four years from the date the judgment and sentence became final;
- Four years from the date the conviction was affirmed on direct appeal;
- Four years from the date collateral counsel was appointed (applicable solely in death penalty cases); or
- October 1, 2005.[3]

The law also provides a catch-all exception to the four-year time limitation. A person convicted at trial and sentenced could petition at any time for postconviction DNA testing if the facts upon which the petition is founded were unknown or could not have been known with the exercise of due diligence.

**PRESERVATION OF PHYSICAL EVIDENCE**

Current law provides for preservation of physical evidence collected at the time of the crime for which postconviction DNA testing may be requested.[4] With the exception of death penalty cases, physical evidence in the possession of governmental entities must be maintained for at least four years or until October 1, 2005.[5] Evidence in death penalty cases must be maintained for 60 days after the execution of the sentence. Physical evidence may be disposed of prior to the time limitations if certain conditions are met.[6]

Physical evidence in older cases may have long since been destroyed as a matter of routine purging. If, however, the evidence existed and was under the control of a governmental entity at the time of the enactment of s. 925.11, F.S., it is highly unlikely that it has been destroyed. Given the advent of new DNA testing methods, governmental agencies are keenly aware of the potential usefulness of this evidence.

Most recently, the governor issued Executive Order 05-160.[7] The order requires governmental entities in the possession of any physical evidence to preserve the evidence for which DNA testing may be requested.

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[2] *See* s. 943.3251, F.S.
[3] Section 925.11(1)(b), F.S.
[4] Section 925.11(4), F.S.
[5] *See* s. 925.11(4), F.S.
[6] Section 925.11(4)(c), F.S., provides the conditions under which physical evidence may be disposed of prior to the time limitations set forth in s. 925.11(1)(b), F.S. Prior to the disposition of evidence, notice must be provided to the defendant and any counsel of record, the prosecuting authority, and the Attorney General. Within 90 days after notification, if the notifying governmental entity does not receive either a copy of a petition for postconviction DNA testing or a request not to dispose of the evidence because a petition will be filed, the evidence may be disposed of, unless some other provision of law or rule requires its preservation or retention.
[7] The order was issued August 5, 2005.

**RIGHTS TO APPEAL, GENERALLY**

Under current law, a defendant who has been convicted has certain rights to appeal on direct appeal or on matters that are collateral to the conviction.[8]

**DIRECT APPEALS AFTER TRIAL**

Matters that are raised on direct appeal include evidentiary rulings made by the trial court during the course of the defendant's trial, and other matters objected to during the course of the trial such as the jury instructions, prosecutorial misconduct, and procedural rulings made by the trial court. The Legislature has codified the "contemporaneous objection" rule, a procedural bar that prevented defendants from raising issues on appeal that had not been objected to at the trial level. The rule allowed trial court judges to consider rulings carefully, perhaps correcting potential mistakes at the trial level.

In *State v. Jefferson*,[9] the Florida Supreme Court found that the provision did not represent a jurisdictional bar to appellate review in criminal cases, but rather that the Legislature acted within its power to "place reasonable conditions" upon this right to appeal.[10]

**COLLATERAL REVIEW**

Postconviction proceedings, also known as collateral review,[11] usually involve claims:

- That the defendant's trial counsel was ineffective;
- Of newly discovered evidence; and
- That the prosecution failed to disclose exculpatory evidence.

A motion must be filed in the trial court where the defendant was tried and sentenced.[12] Unless the record in the case conclusively shows that the defendant is entitled to no relief, the trial court must order the state attorney to respond to the motion and may then hold an evidentiary hearing.[13] If the trial court denies the motion for postconviction relief with or without holding an evidentiary hearing, the defendant is then entitled to an appeal of this denial to the District Court of Appeal that has jurisdiction over the circuit court where the motion was filed.[14]

Motions for postconviction relief based on newly discovered evidence must be raised within two years of the discovery of such evidence.[15] The Florida Supreme Court has held that the two year time limit for filing a motion based on newly discovered evidence begins to run on a defendant's postconviction request for DNA testing when the testing method became available. For example, in *Sireci v. State*,[16] the Florida Supreme Court held that the defendant's postconviction claim filed on his 1976 conviction,

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[8] Article V, section 4(b) of the Florida Constitution has been construed to convey a constitutional protection of this right. *See Amendments to the Florida Rules of Appellate Procedure*, 696 So.2d 1103 (Fla. 1996).
[9] 758 So.2d 661 (Fla. 2000).
[10] *Id.* at 664 (citing *Amendments to the Florida Rules of Appellate Procedure, supra*, at 1104-1105).
[11] Procedurally, collateral review is generally governed by FLA. R. CRIM. P. 3.850.
[12] The motion must be filed within two years of the defendant's judgment and sentence becoming final unless the motion alleges that the facts on which the claim is based were unknown to the defendant and could not have been ascertained by the exercise of due diligence. *See* FLA. R. CRIM. P. 3.850(b).
[13] *See* FLA. R. CRIM. P. 3.850(d).
[14] In order to grant a new trial based on newly discovered evidence, the trial court must first find that the evidence was unknown and could not have been known at the time of trial through due diligence. Also, the trial court must find that the evidence is of such a nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 709 So.2d 512 (Fla. 1998); *Torres-Arboleda v. Dugger*, 636 So.2d 1321 (Fla. 1994).
[15] *See Adams v. State*, 543 So.2d 1244 (Fla.1989).
[16] 773 So.2d 34 (Fla. 2000).

which was filed in 1993, was time barred because "DNA typing was recognized in this state as a valid test as early as 1988."[17]

If a defendant has been sentenced to death, the defendant is entitled to challenge the conviction and sentence in three stages. First, the public defender or private counsel is required to file a direct appeal to the Florida Supreme Court. An appeal of that decision is to the U.S. Supreme Court by petition for writ of *certiorari.* Second, if the U.S. Supreme Court rejects the appeal, the defendant's sentence becomes final and the state collateral postconviction proceeding or collateral review begins.[18] The third stage is to seek a federal writ of *habeas corpus.*[19] Appeals of federal *habeas* petitions from Florida are to the U.S. Court of Appeals for the Eleventh Circuit and then to the U.S. Supreme Court. Finally, once the Governor signs a death warrant, a defendant will typically file a second or successive collateral postconviction motion and a second federal *habeas* petition along with motions to stay the execution.

C. SECTION DIRECTORY:

Section 1 amends s. 925.11, F.S., relating to postconviction DNA testing.

Section 2 provides an effective date of "upon becoming a law," applied retroactively to September 30, 2005.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have a fiscal impact on state revenues.

2. Expenditures:

   Petitions generated by the bill will have an indeterminate impact on trial courts, state attorneys, public defenders, the Department of Corrections, and FDLE. It is unknown the extent of FDLE's backlog, if any, on DNA testing and particularly, postconviction DNA testing orders. It is unknown how much expense is incurred on behalf of indigent defendants for postconviction DNA testing.[20]

   Also, it is unknown how much expense is incurred on behalf of indigent defendants to investigate and determine viable claims for filing postconviction petitions for DNA testing.

   The bill may impose an indeterminate increase in costs incurred in storage and preservation of evidence in the custody of state governmental entities including but not limited to FDLE, the courts, state attorneys' offices, public and private labs, hospital facilities, public defenders' offices and capital collateral offices.

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[17] *Id.* at 43. *See also Ziegler v. State*, 654 So.2d 1162 (Fla. 1995).

[18] State collateral postconviction proceedings are controlled by Rules 3.850, 3.851 and 3.852, FLA. R. CRIM. P. Unlike a direct appeal, which challenges the legal errors apparent from the trial transcripts or record on appeal, a collateral postconviction proceeding is designed to raise claims which are "collateral" to what transpired in the trial court. Consequently, such postconviction proceedings usually involve three categories of claims: ineffective assistance of trial counsel; violations of *Brady v. Maryland* (373 U.S. 83 (1963)), i.e., denial of due process by the prosecution's suppression of material, exculpatory evidence; and newly discovered evidence, for example, post-trial recantation by a principal witness. Since the consideration of these claims often require new fact finding, collateral postconviction motions are filed in the trial court that sentenced the defendant to death. Appeals from the grant or denial of postconviction relief are to the Florida Supreme Court.

[19] This is a proceeding controlled by Title 28 U.S.C. § 2254(a). Federal *habeas* allows a defendant to petition a U.S. district court to review whether the conviction or sentence violates or was obtained in violation of federal law. Federal *habeas* is almost exclusively limited to consideration of claims previously asserted on direct appeal or in state postconviction proceedings.

[20] Fiscal information from FDLE was not available at the time this analysis was published.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have a fiscal impact on local revenues.

2. Expenditures:

The bill may impose an indeterminate increase in costs incurred in storage and preservation of evidence in the custody of local governmental entities, including but not limited to police and sheriff's departments, clerks of the court,[21] and hospital facilities.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may impose an indeterminate increase in costs incurred in storage and preservation of evidence in the custody of nongovernmental entities, including but not limited to private labs, hospital facilities, and private counsels' offices.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution, because it is a criminal law.

2. Other:

**Separation of Powers: Substance versus Procedure**

The bill could raise concerns regarding separation of powers.

Constitutional Authority

Under Article V, Section 2 of the Florida Constitution, the Supreme Court "shall adopt rules of practice and procedure in all courts . . ." The same section also authorizes the Legislature to repeal court rules of procedure with a two-thirds vote of the membership of both houses.

Separation of Powers

Article II, Section 3 of the Florida Constitution provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." The Legislature has the exclusive power to enact substantive laws[22] while Article V, section 2 of the Florida Constitution, grants the Florida Supreme Court the power to "adopt rules for the practice and procedure in all courts, including the time for seeking appellate review."

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[21] Per the Florida Association of Court Clerks and Comptrollers (FACC), the clerk is required to preserve evidence in a criminal case "virtually forever—law requires clerks to hold evidence in a criminal case in the event there could potentially be an appeal....there are appeals even on death row." The clerks are fine with the suggested extended timeframes in the bill. Email from the FACC, October 11, 2005.

[22] *See* Art. III, s. 1, Fla. Const.; *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000); *Johnson v. State*, 336 So.2d 93 (Fla. 1976).

Changes to substantive law by court rules of procedure appear to violate the separation of powers provision of the Florida Constitution.[23]

Distinguishing Substance from Procedure

Generally speaking, "substantive law" involves matters of public policy affecting the authority of government and rights of citizens relating to life, liberty and property. Court "rules of practice and procedure" govern the administration of courts, and the behavior of litigants within a court proceeding.[24] In practice, determining the difference is not simple or clear. In 1973, Justice Adkins described the difference between substance and procedure:

> The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure." Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.[25]

This "twilight zone" remains to this day, and causes, in the analysis of many enactments, a difficult determination of whether a matter is procedural or substantive.

DNA Testing

In 2001, the legislature created a limited statutory right to give defendants in closed criminal cases an additional opportunity to prove their innocence using DNA evidence.[26] It provided a two-year time period for pending and future cases that expired on October 1, 2003. Shortly after enactment, the court passed a rule to implement the statute reflecting the statutory deadlines.[27] Prior to the October 1 expiration, the court issued an order temporarily suspending the deadline. In addition, the court ordered government entities to store evidence in all closed criminal cases indefinitely.[28] The opinion of the court suspending the statutory deadline was a four to three decision. Justice Wells said in

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[23] *Id.*

[24] In *Allen v. Butterworth*, the Florida Supreme Court referred to a discussion explaining the distinction between substance and procedure from Justice Adkins' concurring opinion in *In Re Rules of Criminal Procedure*, 272 So.2d 65,66 (Fla. 1972):

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.

[25] *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1973).

[26] *See* s. 925.11, F.S.; ch. 2001-197, L.O.F.

[27] *See Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853*, 807 So.2d 633 (Fla. 2001).

[28] *See Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A) (Postconviction DNA Testing)*, 857 So.2d 190 (Fla. 2003).

dissent ". . . this Court does not have jurisdiction to 'suspend' a provision of a lawfully enacted statute or to mandate that evidence . . . be maintained beyond the period the statute specifically states that the evidence is to be maintained."[29]

In 2004, the legislature further amended the law to extend the time period from two to four years and provided for expiration October 1, 2005.[30] In September 2004, the court amended its rule to reflect the statutory changes.[31] The court has amended the rule, once again, to extend the deadline from October 1, 2005, to July 1, 2006.[32]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Florida Bar has "adopted a legislative position calling for a permanent method for state inmates to seek DNA testing that could exonerate them."[33] The Bar has not taken a position on whether postconviction DNA testing should be made available to those who plead guilty or no contest.[34]

The Florida Innocence Initiative has stated that maintenance of evidence is the most critical aspect of preserving a defendant's right to DNA testing.[35]

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

Not applicable.

[29] Justice Wells was joined by Justices Cantero and Bell. Comments of the Criminal Court Steering Committee, October 13, 2003, at 8 and 9 n.33, (citing Wells, J., dissenting in *Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A)*).
[30] *See* ch. 2004-67, L.O.F.
[31] *See* 884 So.2d 934.
[32] *See Amendments to Florida Rule of Criminal Procedure 3.853(D)*, SC05-1702 (September 29, 2005).
[33] Blankenship, G. "Bar supports permanent DNA reforms," *The Florida Bar News*, September 15, 2005.
[34] *Id.*
[35] Pudlow, J. "Momentum builds for extending DNA testing," *The Florida Bar News*, September 1, 2005.

A bill to be entitled

An act relating to postsentencing DNA testing; amending s. 925.11, F.S.; deleting time limits for filing petitions for postsentencing DNA testing when facts on which the petition is predicated were unknown and could not have been ascertained by the exercise of due diligence; revising provisions relating to time periods for preservation of physical evidence; providing for retroactive application; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (b) of subsection (1) and subsection (4) of section 925.11, Florida Statutes, are reenacted and amended to read:

925.11 Postsentencing DNA testing.--

(1) Petition for examination.--

(b) ~~Except as provided in subparagraph 2.,~~ A petition for postsentencing DNA testing may be filed or considered~~:~~

~~1. Within 4 years following the date that the judgment and sentence in the case becomes final if no direct appeal is taken, within 4 years following the date that the conviction is affirmed on direct appeal if an appeal is taken, within 4 years following the date that collateral counsel is appointed or retained subsequent to the conviction being affirmed on direct appeal in a capital case, or by October 1, 2005, whichever occurs later; or~~

~~2.~~ at any time if the facts on which the petition is predicated were unknown to the petitioner or the petitioner's attorney and could not have been ascertained by the exercise of due diligence.

(4) Preservation of evidence.--

(a) Governmental entities that may be in possession of any physical evidence in the case, including, but not limited to, any investigating law enforcement agency, the clerk of the court, the prosecuting authority, or the Department of Law Enforcement shall maintain any physical evidence collected at the time of the crime for which a postsentencing testing of DNA may be requested.

(b) Except for a case in which the death penalty is imposed, the evidence shall be maintained ~~for~~ at least until the defendant's sentence has been completed, except as provided in paragraph (c) ~~the period of time set forth in subparagraph (1)(b)1~~. In a case in which the death penalty is imposed, the evidence shall be maintained for 60 days after execution of the sentence.

(c) A governmental entity may dispose of the physical evidence before the expiration of the period of time set forth in paragraph ~~(1)~~(b) if all of the conditions set forth below are met:~~.~~

1. The governmental entity notifies all of the following individuals of its intent to dispose of the evidence: the sentenced defendant, any counsel of record, the prosecuting authority, and the Attorney General.

2. The notifying entity does not receive, within 90 days after sending the notification, either a copy of a petition for postsentencing DNA testing filed pursuant to this section or a request that the evidence not be destroyed because the sentenced defendant will be filing the petition before the defendant has completed his or her sentence ~~time for filing it has expired~~.

3. No other provision of law or rule requires that the physical evidence be preserved or retained.

Section 2. This act shall take effect upon becoming a law and shall apply retroactively to September 30, 2005.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (for drafter's use only)

Bill No. 0061

COUNCIL/COMMITTEE ACTION

| | |
|---|---|
| ADOPTED | __ (Y/N) |
| ADOPTED AS AMENDED | __ (Y/N) |
| ADOPTED W/O OBJECTION | __ (Y/N) |
| FAILED TO ADOPT | __ (Y/N) |
| WITHDRAWN | __ (Y/N) |
| OTHER | _____ |

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Council/Committee hearing bill: Governmental Operations Committee

Representative(s) Quinones offered the following:

**Amendment (with title amendment)**

Remove everything after the enacting clause and insert:

Section 1. Section 925.11, Florida Statutes, is amended to read:

925.11 Postsentencing DNA testing.--

(1) Petition for examination.--

(a) A person who has been convicted of a felony and sentenced for committing that offense ~~tried and found guilty of committing a crime and has been sentenced~~ by a court established by the laws of this state may petition that court to order the examination of physical evidence collected at the time of the investigation of the crime for which he or she has been sentenced which may contain DNA (deoxyribonucleic acid) and which would exonerate that person or mitigate the sentence that person received.

(b) A petition for postsentencing DNA testing may be filed or considered at any time following the date that the judgment and sentence in the case becomes final. ~~Except as provided in~~

~~subparagraph 2., a petition for postsentencing DNA testing may be filed or considered:~~

~~1. Within 4 years following the date that the judgment and sentence in the case becomes final if no direct appeal is taken, within 4 years following the date that the conviction is affirmed on direct appeal if an appeal is taken, within 4 years following the date that collateral counsel is appointed or retained subsequent to the conviction being affirmed on direct appeal in a capital case, or by October 1, 2005, whichever occurs later; or~~

~~2. At any time if the facts on which the petition is predicated were unknown to the petitioner or the petitioner's attorney and could not have been ascertained by the exercise of due diligence.~~

(2) Method for seeking postsentencing DNA testing.--

(a) The petition for postsentencing DNA testing must be made under oath by the sentenced defendant and must include the following:

1. A statement of the facts relied on in support of the petition, including a description of the physical evidence containing DNA to be tested and, if known, the present location or the last known location of the evidence and how it was originally obtained;

2. A statement that the evidence was not previously tested for DNA or a statement that the results of any previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques would likely produce a definitive result;

3. A statement that the sentenced defendant is innocent and how the DNA testing requested by the petition will exonerate the defendant of the crime for which the defendant was sentenced

or will mitigate the sentence received by the defendant for that crime;

4. A statement that identification of the defendant is a genuinely disputed issue in the case, and why it is an issue;

5. Any other facts relevant to the petition; and

6. A certificate that a copy of the petition has been served on the prosecuting authority.

(b) Upon receiving the petition, the clerk of the court shall file it and deliver the court file to the assigned judge.

(c) The court shall review the petition and deny it if it is insufficient. If the petition is sufficient, the prosecuting authority shall be ordered to respond to the petition within 30 days.

(d) Upon receiving the response of the prosecuting authority, the court shall review the response and enter an order on the merits of the petition or set the petition for hearing.

(e) Counsel may be appointed to assist the sentenced defendant if the petition proceeds to a hearing and if the court determines that the assistance of counsel is necessary and makes the requisite finding of indigency.

(f) The court shall make the following findings when ruling on the petition:

1. Whether the sentenced defendant has shown that the physical evidence that may contain DNA still exists;

2. Whether the results of DNA testing of that physical evidence would be admissible at trial and whether there exists reliable proof to establish that the evidence has not been materially altered and would be admissible at a future hearing; and

3. Whether there is a reasonable probability that the sentenced defendant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

(g) If the court orders DNA testing of the physical evidence, the cost of such testing may be assessed against the sentenced defendant unless he or she is indigent. If the sentenced defendant is indigent, the state shall bear the cost of the DNA testing ordered by the court.

(h) Any DNA testing ordered by the court shall be carried out by the Department of Law Enforcement or its designee, as provided in s. 943.3251.

(i) The results of the DNA testing ordered by the court shall be provided to the court, the sentenced defendant, and the prosecuting authority.

(3) Right to appeal; rehearing.--

(a) An appeal from the court's order on the petition for postsentencing DNA testing may be taken by any adversely affected party.

(b) An order denying relief shall include a statement that the sentenced defendant has the right to appeal within 30 days after the order denying relief is entered.

(c) The sentenced defendant may file a motion for rehearing of any order denying relief within 15 days after service of the order denying relief. The time for filing an appeal shall be tolled until an order on the motion for rehearing has been entered.

(d) The clerk of the court shall serve on all parties a copy of any order rendered with a certificate of service, including the date of service.

(4) Preservation of evidence.--

(a) Governmental entities that may be in possession of any physical evidence in the case, including, but not limited to, any investigating law enforcement agency, the clerk of the court, the prosecuting authority, or the Department of Law Enforcement shall maintain any physical evidence collected at the time of the crime for which a postsentencing testing of DNA may be requested.

(b) ~~Except for a case in which the death penalty is imposed, the evidence shall be maintained for at least the period of time set forth in subparagraph (1)(b)1.~~ In a case in which the death penalty is imposed, the evidence shall be maintained for 60 days after execution of the sentence. In all other cases, a governmental entity may dispose of the physical evidence if the term of the sentence imposed in the case has expired and

~~(c) A governmental entity may dispose of the physical evidence before the expiration of the period of time set forth in paragraph (1)(b) if all of the conditions set forth below are met.~~

~~1. The governmental entity notifies all of the following individuals of its intent to dispose of the evidence: the sentenced defendant, any counsel of record, the prosecuting authority, and the Attorney General.~~

~~2. The notifying entity does not receive, within 90 days after sending the notification, either a copy of a petition for postsentencing DNA testing filed pursuant to this section or a request that the evidence not be destroyed because the sentenced defendant will be filing the petition before the time for filing it has expired.~~

~~3.~~ no other provision of law or rule requires that the physical evidence be preserved or retained.

Amendment No. (for drafter's use only)

Section 2. This act shall take effect upon becoming a law, and shall apply retroactively to October 1, 2005.

========== T I T L E A M E N D M E N T ==========

Remove the entire title and insert:

An act relating to the postsentence testing of DNA evidence; amending s. 925.11, F.S.; revising the circumstances under which a person who has been sentenced for committing a felony may petition the court for postsentence testing of DNA evidence; abolishing certain time limitations imposed upon such testing; authorizing a governmental entity to dispose of physical evidence if the sentence imposed has expired and another law or rule does not require that the evidence be retained; providing for retroactive application; providing an effective date.

HJR 63

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HJR 63 Real Property Rights of Aliens Ineligible for Citizenship
**SPONSOR(S):** Brutus
**TIED BILLS:** None **IDEN./SIM. BILLS:** None

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Governmental Operations Committee | | Williamson | Everhart |
| 2) Judiciary Committee | | | |
| 3) State Administration Council | | | |
| 4) | | | |
| 5) | | | |

### SUMMARY ANALYSIS

The Florida Constitution provides that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. This "alien land law" provision was adopted in 1926 to bar certain nationalities of immigrants from acquiring land in Florida.

The joint resolution proposes amending the Florida Constitution to remove the alien land law.

The joint resolution appears to have a fiscal impact on state government. The Department of State, Division of Elections, estimates a non-recurring cost of approximately $37,000 for FY 2006-07. The cost is a result of placing the joint resolution on the ballot and publishing required notices.

The joint resolution does not contain a specific effective date. Therefore, if adopted by the voters, it would take effect January 2, 2007.

**The joint resolution requires a three-fifths vote of the membership for passage.**

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

**Provide limited government** – The joint resolution removes the ability of the legislature to regulate the property rights of aliens ineligible for citizenship.

**Safeguard individual liberty** – The joint resolution provides aliens ineligible for citizenship with the same basic rights regarding real property that are guaranteed to all persons.

B. EFFECT OF PROPOSED CHANGES:

**Background**

The state constitution provides that all natural persons are equal before the law and have inalienable rights, among which is the right to acquire, possess and protect property. However, the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law.[1] This exception, known as the "alien land law," basically blocked anyone ineligible for U.S. citizenship from owning land in Florida.

The alien land law was added to the state constitution in 1926 and survived revisions of the constitution in 1968, 1978, and 1998. Of the states that adopted alien land laws, only Florida and New Mexico have retained such law.[2]

The alien land law was created to ban Japanese farmers from leasing or owning property.[3] Over the course of the 1940's, the exclusion of particular Asian nationalities from U.S. citizenship gradually was eliminated, until federal naturalization law was made entirely race- and nationality-neutral in the Immigration and Nationality Act of 1952.[4]

The only persons ineligible for citizenship under current federal law are ineligible on an individual basis and not on a national or racial basis. To be eligible for naturalization an immigrant must:

- Be a legal permanent resident of the United States for five years;[5]
- Demonstrate knowledge of the English language and of the history, principles and form of government of the United States;[6]
- Be of "good moral character;"[7] and
- Not be a deserter from the U.S. military.[8]

Because an applicant for naturalization must be a legal permanent resident, eligibility for naturalization also relates back to initial eligibility for admission into the United States. Federal law provides that an

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[1] Section 2, Art. I of the Florida Constitution.
[2] "Alien Land Law Soils Our State," The Miami Herald, July 1, 2003.
[3] "Asian-Americans Call for Vote on Discriminatory State Law," Sun-Sentinel, April 24, 2004.
[4] Public Law 82-414, chapter 477, 66 Stat. 163 (June 27, 1952).
[5] *See* 8 U.S.C. s. 1427(a).
[6] *See* 8 U.S.C. s. 1423(a). These requirements do not apply to applicants for naturalization who are unable to comply due to physical or developmental disability or mental impairment. *See* 8 U.S.C. s. 1423(b)(1). Requirements with respect to knowledge of the English language do not apply to applicants for naturalization who are over 50 years old and a permanent legal resident for at least 20 years or over 55 and a permanent legal resident for at least 15 years. *See* 8 U.S.C. s. 1423(b)(2).
[7] *Id.*
[8] *See* 8 U.S.C. s. 1425.

alien is inadmissible if he or she:

- Is infected with a communicable disease designated by the Secretary of Health and Human Services as being of public health significance;
- Fails to present documentation of having received vaccination against vaccine-preventable diseases;
- Has a physical or mental disorder and behavior or a history of behavior associated with that disorder that is a threat to his or her own or others' property, safety or welfare;
- Is a drug user or addict;
- Has been convicted of a crime of moral turpitude or of any federal, state, or foreign crime relating to trafficking in controlled substances;
- Has been convicted of two or more crimes of any kind, other than purely political offenses, the aggregate sentences for which were five years or more;
- Is reasonably believed by the Attorney General or a consular officer to have been involved in drug trafficking or is the spouse or child of such a person and has profited from those activities within five years;
- Seeks entry to engage in or profit from any unlawful commercialized vice, including but not limited to prostitution, or has engaged in or profited from such activities in the past 10 years;
- Has ever asserted diplomatic immunity to escape criminal prosecution in the U.S.;
- Has engaged in severe violations of religious freedom as an official of a foreign government;
- Is reasonably believed to have trafficked in persons or benefited from traffic in persons;
- Is reasonably believed to be involved in money laundering;
- Is reasonably believed to be seeking entry to engage in sabotage, espionage, or attempts to overthrow the U.S. government by force;
- Has engaged in or are reasonably expected to engage in or incite, terrorist activity; or
- Is a representative or member of a foreign terrorist organization.[9]

As such, the Legislature could arguably regulate or prohibit an alien who has unlawfully entered the country or who falls in any of the above categories from acquiring or disposing of real property in Florida under the alien land law provision of the state constitution.

**Effect of Bill**

The joint resolution proposes to remove the alien land law provision from section 2, Art. I of the state constitution. It does not appear to render any statutes void since it does not appear that any provisions of the Florida Statutes currently in effect were enacted pursuant to this constitutional provision.

The joint resolution does not contain a specific effective date. Therefore, if adopted by the voters, it would take effect January 2, 2007.

C. SECTION DIRECTORY:

The joint resolution is not divided into sections.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The joint resolution does not appear to have a fiscal impact on state revenues.

[9] *See* 8 U.S.C. s. 1182(a).

2. Expenditures:

| Non-Recurring | FY 2006-07 |
|---|---|
| Department Of State, Division of Elections Publication Costs | $37,000 (General Revenue)[10] |

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The joint resolution does not appear to have a fiscal impact on local revenues.

2. Expenditures:

The joint resolution does not appear to have a fiscal impact on local expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The state constitution requires publication of a proposed amendment or revision to the constitution in one newspaper of general circulation in each county in which a newspaper is published, once in the tenth week and once in the sixth week immediately preceding the week in which the election is held. The Department of State, Division of Elections, estimates that the non-recurring cost of compliance would be approximately $37,000 in FY 2006-07.[11]

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Article VII, s. 18 of the Florida Constitution applies only to general laws.

2. Other:

**Constitutional Amendment Process**

This is a legislative joint resolution, which is one of the methods for proposing, approving or rejecting amendments to the state constitution. The joint resolution requires passage by a three-fifths vote of the membership of each house of the Legislature.[12] The proposed constitutional amendment must be submitted to the electors at the next general election held more than 90 days after the joint resolution is filed with the custodian of state records. If approved by a majority of the electors voting on the question, the proposed amendment becomes effective on the Tuesday after the first Monday in January following the election or on such other date as may be specified in the amendment.

**Equal Protection**

The Fourteenth Amendment to the United States Constitution guarantees the equal protection of the laws to "persons," not only to citizens. This joint resolution may be redundant in light of this federal guarantee, since any legislation enacted pursuant to the alien land law provision of section 2, Art. I of the state constitution could be challenged as an equal-protection violation.

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[10] Telephone conversation with department staff on October 5, 2005.
[11] *Id.*
[12] Section 1, Art. XI of the Florida Constitution.

While Congress may, in light of its full power over immigration,[13] generally make classifications based on citizenship as long as they are not arbitrary and unreasonable,[14] state or local laws that do so are subject to strict scrutiny. Such laws must seek to advance a compelling governmental interest and must be narrowly tailored to advancing that interest.[15] Although some state and local classifications based on citizenship have not been held subject to strict scrutiny, this has primarily been in the field of public employment.[16] Overcoming strict scrutiny can be difficult;[17] however, even if applied in a race- and nationality-blind manner, it is unclear how legislation barring ownership of real property in the state to certain specified aliens could satisfy the requirements of strict scrutiny. The Supreme Court of the United States has treated similar legislation as unconstitutional since at least the 1940's,[18] as have several state supreme courts in analyzing their own alien land law provisions before they were repealed.[19]

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

Not applicable.

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[13] *See* Art. I, s. 8, U.S. Const.
[14] *See Mathews v. Diaz*, 426 U.S. 67 (1976).
[15] *See Bernal v.* Fainter, 467 U.S. 216 (1984).
[16] *See, e.g., Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Ambach v. Norwick*, 441 U.S. 68 (1979).
[17] *See, e.g., Maine v. Taylor*, 477 U.S. 131 (1986) (allowing a state ban on importation of live baitfish to survive strict scrutiny under the Commerce Clause); *Buckley v. Valeo*, 424 U.S. 1 (1976) (allowing some campaign finance restrictions to survive strict scrutiny under the First Amendment but striking down others).
[18] *See, e.g., Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948); *Oyama v. California*, 332 U.S. 633 (1948).
[19] *See, e.g., State v. Oakland*, 287 P.2d 39 (Mont. 1955); *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952); *Namba v. McCourt*, 204 P.2d569 (Or. 1949).

House Joint Resolution

A joint resolution proposing an amendment to Section 2 of Article I of the State Constitution relating to basic rights.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 2 of Article I of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE I

DECLARATION OF RIGHTS

SECTION 2. Basic rights.--All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess, and protect property~~; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law~~. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE I, SECTION 2



CODING: Words ~~stricken~~ are deletions; words underlined are additions.

REAL PROPERTY RIGHTS OF ALIENS INELIGIBLE FOR CITIZENSHIP.--Proposing an amendment to the State Constitution to delete a provision stating that the ownership, inheritance, disposition, and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law.

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 143 Retirement
**SPONSOR(S):** Brummer
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 92

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Governmental Operations Committee | | Williamson | Everhart |
| 2) Local Government Council | | | |
| 3) Fiscal Council | | | |
| 4) State Administration Council | | | |
| 5) | | | |

## SUMMARY ANALYSIS

The current employer contribution rates to the Florida Retirement System (FRS) Trust Fund are 6.67 percent for the Regular Class and 17.37 percent for the Special Risk Class. The bill increases the FRS contribution rates for the Special Risk Class from 17.37 percent to 17.68 percent (+0.31 percent).

The bill provides that a Special Risk Class member of the Florida Retirement System (FRS) who is a law enforcement officer, correctional officer, correctional probation officer, firefighter, emergency medical technician, or paramedic is considered totally and permanently disabled if he or she has a job-related injury that causes physical or mental impairment and is unable to perform the duties of his or her position, unless proven otherwise by the Secretary of the Department of Management Services ("administrator").

The bill shifts the burden of proof from the employee to the administrator, and creates an easier standard for the injured employee to meet in order to receive a higher disability benefit.

The bill authorizes reemployment of that officer, firefighter, emergency medical technician, or paramedic:

- By an employer who does not participate in FRS; or
- After one calendar month of retirement, by an FRS employer.

Subject to the above conditions, the disabled officer, firefighter, emergency medical technician or paramedic may be reemployed in any position other than the one he or she was employed at the time of disability retirement. The employee will continue to receive his or her in-line-of-duty disability retirement benefit.

The total first-year cost is $9,962,000, with increasing costs each year thereafter. The bill does not appropriate additional funding; therefore, the additional costs will be absorbed within existing resources.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

**Provide limited government** – The bill increases the retirement contribution rates for the Special Risk Class.

**Promote personal responsibility** – The bill increases benefits to state and local employees who may be injured due to the intentional acts of another, without requiring the responsible party to pay the costs of such increased benefit.

**Empower families** – The bill provides for increased disability retirement benefits for certain public safety workers at the state and local levels who are injured under certain conditions, enabling them to continue to provide for themselves and their families.

B. EFFECT OF PROPOSED CHANGES:

**Officer Malcolm Thompson**

Background

In 1997, Officer Malcolm Thompson of Kissimmee was shot several times in the head, neck, and stomach by a suspect wanted for armed robbery and carjacking. Despite his severe injuries he shot and killed the suspect.[1]

Effect of Bill

The bill names the act the "Officer Malcolm Thompson Act."

**Florida Retirement System**

Background

The Florida Retirement System (FRS) provides retirement and disability benefits for state and county employees and for employees of those cities and special districts that choose to participate in the FRS. The current employer contribution rates to the FRS Trust Fund are 6.67 percent for the Regular Class and 17.37 percent for the Special Risk Class[2] (the members of which include, but are not limited to, police officers, correctional officers, correctional probation officers, firefighters, emergency medical technicians, and paramedics).

Limited disability benefits are payable to FRS-covered employees for illnesses or injuries causing the individual to be totally and permanently disabled. To receive disability benefits, the individual must prove that he or she is prevented by reason of a medically determinable physical or mental impairment from rendering useful and efficient service in any regularly-established position with the employer. For injuries not occurring in the line of duty, an employee must have five to 10 years of creditable service before the disability to be eligible for this benefit. However, if the injury occurs in the line of duty, the employee qualifies for an increased disability benefit regardless of his or her years of service. The general disability benefit is 42 percent of the employee's average final compensation (AFC). The in-line-of-duty benefit for special risk employees is at least 65 percent of the AFC.[3]

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[1] "Wounded Cop Kills Robbery Suspect," *Miami Herald*, 4 June 1997, p. 2B.
[2] Section 121.71(3), F.S.
[3] Section 121.091(4), F.S.

Effect of Bill

The bill provides that a member of the Special Risk Class who is employed as a law enforcement officer, correctional officer, correctional probation officer, firefighter, emergency medical technician, or paramedic is considered totally and permanently disabled in the line of duty if he or she is prevented, by reason of a medically determinable physical or mental impairment caused by a job-related injury, from performing useful and efficient service in his or her position. The employee will receive the higher in line of duty disability benefit unless the Secretary of the Department of Management Services ("administrator") can provide "competent medical evidence to the contrary." Thus, the burden of proof is shifted from the employee to the administrator, and an easier standard is created for the injured employee to meet in order to receive a higher disability benefit.

The bill authorizes reemployment of the disabled officer, firefighter, emergency medical technician, or paramedic:

- By an employer who does not participate in FRS; or
- After one calendar month of retirement, by an FRS employer.

Subject to the above conditions, the disabled officer, firefighter, emergency medical technician, or paramedic may be reemployed in *any position* other than the one he or she was employed at the time of disability retirement. This allows an employee to return to work in a different position within the same job classification. Thus, a "law enforcement officer" could return to work with the same employer as a "law enforcement officer" as long as that officer was assigned to a different position. The employee would continue to receive his or her in line of duty disability retirement benefits while receiving a salary from subsequent employment. Thus, the bill establishes a different disability determination criteria for certain FRS Special Risk Class members. Current law describes "total and permanent disability" for all FRS members as being "if, in the opinion of the administrator, he or she is prevented, by reason of a medically determinable physical or mental impairment, from rendering useful and efficient service as an officer or employee."[4]

The bill increases the FRS contribution rates for the Special Risk Class from 17.37 percent to 17.68 percent (+0.31 percent). It also provides a declaration of important state interest.

C. SECTION DIRECTORY:

Section 1 provides a popular name.

Section 2 declares a public purpose for this bill.

Section 3 amends s. 121.091, F.S., relating to in line of duty disability benefits and reemployment after retirement.

Section 4 increases the employer contribution rates for the Special Risk Class by 0.31 percent.

Section 5 provides a July 1, 2006, effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not create, modify or eliminate a state revenue source.

[4] Section 121.0911(4)(b), F.S.

2. Expenditures:

| Year 1 | Year 2 | Year 3[5] |
|---|---|---|
| FY 06/07 | FY 07/08 | FY 08/09 |
| $2,786,000 | $2,897,000 | $3,012,880 |

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not create, modify, or eliminate a local revenue source.

2. Expenditures:

| Year 1 | Year 2 | Year 3[6] |
|---|---|---|
| FY 06/07 | FY 07/08 | FY 08/09 |
| $7,176,000 | $7,463,000 | $7,762,000 |

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not regulate the conduct of persons in the private sector.

D. FISCAL COMMENTS:

The bill increases the FRS contribution rates for the Special Risk Class from 17.37 percent to 17.68 percent (+0.31 percent). This rate increase translates to a total first-year cost of $9,962,000, and increasing costs each year thereafter. Costs are assumed to increase an additional four percent each year. The bill does not appropriate additional funding; therefore, the additional costs will be absorbed within existing resources.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision appears to apply because the bill increases the in-line-of-duty disability for certain officers, firefighters, emergency medical technicians, and paramedics, resulting in local government FRS participants being required to expend funds; however, the following exceptions apply:

- The bill contains a statement of important state interest; and
- Similarly situated persons are all required to comply.

2. Other:

**Section 14, Art. X of the State Constitution**

Since 1976, the Florida Constitution has required that benefit improvements under public pension plans in the state of Florida must be concurrently funded on a sound actuarial basis, as set forth below:

> SECTION 14. State retirement systems benefit changes.—A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits

[5] The costs shown are based upon the 2004 FRS Valuation and will be revised when the 2005 Valuation is completed. Department of Management Services 2006 Substantive Bill Analysis, October 11, 2005.

[6] *Id.*

to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.

**Part VII of ch. 112, Florida Statutes**

Section 14, Art. X, of the State Constitution is implemented by statute under part VII of ch. 112, F.S., the "Florida Protection of Public Employee Retirement Benefits Act," which establishes minimum standards for the operation and funding of public employee retirement systems and plans in the state of Florida. The key provision of this act states the legislative intent to "prohibit the use of any procedure, methodology, or assumptions the effect of which is to transfer to future taxpayers any portion of the costs which may reasonably have been expected to be paid by the current taxpayers."

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

According to the FRS consulting actuaries, changing the standard for total and permanent disability from inability to perform any form of employment to inability to perform your current job, or a limited range of jobs, and shifting the burden of proof from the member to the plan administrator, would increase disability retirements and retirement costs. The higher costs would arise from members becoming eligible for in-line-of-duty disability benefits who would not be eligible for such benefits absent this proposal.[7]

The Department of Management Services also has noted that, under current law, the affected special risk group is not treated as a separate subclass of the Special Risk Class. Therefore, under the existing structure of the FRS, all special risk employers would be required to pay increased rates as a result of this benefit improvement, while the liberalized disability standard would not be available to all special risk employees.[8]

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

Not applicable.

[7] Department of Management Services Substantive Bill Analysis, February 28, 2005.
[8] *Id.*

A bill to be entitled

An act relating to retirement; providing a short title; providing legislative intent; providing a statement of important state interest; amending s. 121.091, F.S.; revising provisions relating to benefits payable for total and permanent disability for certain Special Risk Class members of the Florida Retirement System who are injured in the line of duty; authorizing reemployment of a person who retired with in-line-of-duty disability benefits by employers not participating in a state-administered retirement system; authorizing reemployment of a person who retired with in-line-of-duty disability benefits by an employer participating in a state-administered retirement system after 1 calendar month; providing for contribution rate increases to fund benefits provided in s. 121.091, F.S., as amended; directing the Division of Statutory Revision to adjust contribution rates set forth in s. 121.71, F.S.; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. This act may be cited as the "Officer Malcolm Thompson Act."

Section 2. It is declared by the Legislature that firefighters, emergency medical technicians, paramedics, law enforcement officers, correctional officers, and correctional probation officers, as defined in this act, perform state and municipal functions; that it is their duty to protect life and

property at their own risk and peril; that it is their duty to continuously instruct school personnel, public officials, and private citizens about safety; and that their activities are vital to the public safety. Therefore, the Legislature declares that it is a proper and legitimate state purpose to provide a uniform retirement system for the benefit of firefighters, emergency medical technicians, paramedics, law enforcement officers, correctional officers, and correctional probation officers, as defined in this act, and intends, in implementing the provisions of s. 14, Art. X of the State Constitution as they relate to municipal and special district pension trust fund systems and plans, that such retirement systems or plans be managed, administered, operated, and funded in such manner as to maximize the protection of pension trust funds. Pursuant to s. 18, Art. VII of the State Constitution, the Legislature hereby determines and declares that the provisions of this act fulfill an important state interest.

Section 3. Paragraph (b) of subsection (4) and subsection (9) of section 121.091, Florida Statutes, are amended to read:

121.091 Benefits payable under the system.--Benefits may not be paid under this section unless the member has terminated employment as provided in s. 121.021(39)(a) or begun participation in the Deferred Retirement Option Program as provided in subsection (13), and a proper application has been filed in the manner prescribed by the department. The department may cancel an application for retirement benefits when the member or beneficiary fails to timely provide the information and documents required by this chapter and the department's

rules. The department shall adopt rules establishing procedures for application for retirement benefits and for the cancellation of such application when the required information or documents are not received.

(4) DISABILITY RETIREMENT BENEFIT.--

(b) Total and permanent disability.--

1. Except as provided in subparagraph 2., a member shall be considered totally and permanently disabled if, in the opinion of the administrator, he or she is prevented, by reason of a medically determinable physical or mental impairment, from rendering useful and efficient service as an officer or employee.

2. A member of the Special Risk Class who is a law enforcement officer, firefighter, correctional officer, emergency medical technician, paramedic as described in s. 121.021(15)(c), or community-based correctional probation officer as described in s. 121.021(15)(d)1., shall be considered totally and permanently disabled in the line of duty if he or she is prevented, by reason of a medically determinable physical or mental impairment caused by a job-related injury, from performing useful and efficient service in the position held, unless the administrator can provide competent medical evidence to the contrary.

(9) EMPLOYMENT AFTER RETIREMENT; LIMITATION.--

(a)1. Except as provided in subparagraph 2., any person who is retired under this chapter, except under the disability retirement provisions of subsection (4), may be employed by an employer that does not participate in a state-administered

retirement system and may receive compensation from that employment without limiting or restricting in any way the retirement benefits payable to that person.

2. Any member of the Special Risk Class who retired under the disability retirement provisions of subparagraph (4)(b)2. may be reemployed by any employer not participating in a state-administered retirement system in any position other than the position in which he or she was employed at the time of the disabling illness or injury and may receive compensation from that employment without limiting or restricting in any way the disability benefits payable to that person under the Florida Retirement System.

(b)1.a. Except as provided in sub-subparagraph b., any person who is retired under this chapter, except under the disability retirement provisions of subsection (4), may be reemployed by any private or public employer after retirement and receive retirement benefits and compensation from his or her employer without any limitations, except that a person may not receive both a salary from reemployment with any agency participating in the Florida Retirement System and retirement benefits under this chapter for a period of 12 months immediately subsequent to the date of retirement. However, a DROP participant shall continue employment and receive a salary during the period of participation in the Deferred Retirement Option Program, as provided in subsection (13).

b. Any member of the Special Risk Class who retired under the disability retirement provisions of subparagraph (4)(b)2. may be reemployed by any employer participating in a state-

administered retirement system after having been retired for 1 calendar month, in accordance with s. 121.021(39). After 1 calendar month of retirement, any such retired member may be reemployed in any position other than the one in which he or she was employed at the time of disability retirement and may receive compensation from that employment without limiting or restricting in any way the retirement benefits payable to that person under this chapter. Any retired member who is reemployed within 1 calendar month after retirement shall void his or her application for retirement benefits.

2. Any person to whom the limitation in subparagraph 1. applies who violates such reemployment limitation and who is reemployed with any agency participating in the Florida Retirement System before completion of the 12-month limitation period shall give timely notice of this fact in writing to the employer and to the division and shall have his or her retirement benefits suspended for the balance of the 12-month limitation period. Any person employed in violation of this paragraph and any employing agency which knowingly employs or appoints such person without notifying the Division of Retirement to suspend retirement benefits shall be jointly and severally liable for reimbursement to the retirement trust fund of any benefits paid during the reemployment limitation period. To avoid liability, such employing agency shall have a written statement from the retiree that he or she is not retired from a state-administered retirement system. Any retirement benefits received while reemployed during this reemployment limitation period shall be repaid to the retirement trust fund, and

retirement benefits shall remain suspended until such repayment has been made. Benefits suspended beyond the reemployment limitation shall apply toward repayment of benefits received in violation of the reemployment limitation.

3. A district school board may reemploy a retired member as a substitute or hourly teacher, education paraprofessional, transportation assistant, bus driver, or food service worker on a noncontractual basis after he or she has been retired for 1 calendar month, in accordance with s. 121.021(39). A district school board may reemploy a retired member as instructional personnel, as defined in s. 1012.01(2)(a), on an annual contractual basis after he or she has been retired for 1 calendar month, in accordance with s. 121.021(39). Any other retired member who is reemployed within 1 calendar month after retirement shall void his or her application for retirement benefits. District school boards reemploying such teachers, education paraprofessionals, transportation assistants, bus drivers, or food service workers are subject to the retirement contribution required by subparagraph 7.

4. A community college board of trustees may reemploy a retired member as an adjunct instructor, that is, an instructor who is noncontractual and part-time, or as a participant in a phased retirement program within the Florida Community College System, after he or she has been retired for 1 calendar month, in accordance with s. 121.021(39). Any retired member who is reemployed within 1 calendar month after retirement shall void his or her application for retirement benefits. Boards of trustees reemploying such instructors are subject to the

retirement contribution required in subparagraph 7. A retired member may be reemployed as an adjunct instructor for no more than 780 hours during the first 12 months of retirement. Any retired member reemployed for more than 780 hours during the first 12 months of retirement shall give timely notice in writing to the employer and to the division of the date he or she will exceed the limitation. The division shall suspend his or her retirement benefits for the remainder of the first 12 months of retirement. Any person employed in violation of this subparagraph and any employing agency which knowingly employs or appoints such person without notifying the Division of Retirement to suspend retirement benefits shall be jointly and severally liable for reimbursement to the retirement trust fund of any benefits paid during the reemployment limitation period. To avoid liability, such employing agency shall have a written statement from the retiree that he or she is not retired from a state-administered retirement system. Any retirement benefits received by a retired member while reemployed in excess of 780 hours during the first 12 months of retirement shall be repaid to the Retirement System Trust Fund, and retirement benefits shall remain suspended until repayment is made. Benefits suspended beyond the end of the retired member's first 12 months of retirement shall apply toward repayment of benefits received in violation of the 780-hour reemployment limitation.

5. The State University System may reemploy a retired member as an adjunct faculty member or as a participant in a phased retirement program within the State University System after the retired member has been retired for 1 calendar month,

in accordance with s. 121.021(39). Any retired member who is reemployed within 1 calendar month after retirement shall void his or her application for retirement benefits. The State University System is subject to the retirement ~~retired~~ contribution required in subparagraph 7., as appropriate. A retired member may be reemployed as an adjunct faculty member or a participant in a phased retirement program for no more than 780 hours during the first 12 months of his or her retirement. Any retired member reemployed for more than 780 hours during the first 12 months of retirement shall give timely notice in writing to the employer and to the division of the date he or she will exceed the limitation. The division shall suspend his or her retirement benefits for the remainder of the first 12 months of retirement. Any person employed in violation of this subparagraph and any employing agency which knowingly employs or appoints such person without notifying the Division of Retirement to suspend retirement benefits shall be jointly and severally liable for reimbursement to the retirement trust fund of any benefits paid during the reemployment limitation period. To avoid liability, such employing agency shall have a written statement from the retiree that he or she is not retired from a state-administered retirement system. Any retirement benefits received by a retired member while reemployed in excess of 780 hours during the first 12 months of retirement shall be repaid to the Retirement System Trust Fund, and retirement benefits shall remain suspended until repayment is made. Benefits suspended beyond the end of the retired member's first 12 months of retirement shall apply toward repayment of benefits received

in violation of the 780-hour reemployment limitation.

6. The Board of Trustees of the Florida School for the Deaf and the Blind may reemploy a retired member as a substitute teacher, substitute residential instructor, or substitute nurse on a noncontractual basis after he or she has been retired for 1 calendar month, in accordance with s. 121.021(39). Any retired member who is reemployed within 1 calendar month after retirement shall void his or her application for retirement benefits. The Board of Trustees of the Florida School for the Deaf and the Blind reemploying such teachers, residential instructors, or nurses is subject to the retirement contribution required by subparagraph 7. Reemployment of a retired member as a substitute teacher, substitute residential instructor, or substitute nurse is limited to 780 hours during the first 12 months of his or her retirement. Any retired member reemployed for more than 780 hours during the first 12 months of retirement shall give timely notice in writing to the employer and to the division of the date he or she will exceed the limitation. The division shall suspend his or her retirement benefits for the remainder of the first 12 months of retirement. Any person employed in violation of this subparagraph and any employing agency which knowingly employs or appoints such person without notifying the Division of Retirement to suspend retirement benefits shall be jointly and severally liable for reimbursement to the retirement trust fund of any benefits paid during the reemployment limitation period. To avoid liability, such employing agency shall have a written statement from the retiree that he or she is not retired from a state-administered

retirement system. Any retirement benefits received by a retired member while reemployed in excess of 780 hours during the first 12 months of retirement shall be repaid to the Retirement System Trust Fund, and his or her retirement benefits shall remain suspended until payment is made. Benefits suspended beyond the end of the retired member's first 12 months of retirement shall apply toward repayment of benefits received in violation of the 780-hour reemployment limitation.

7. The employment by an employer of any retiree or DROP participant of any state-administered retirement system shall have no effect on the average final compensation or years of creditable service of the retiree or DROP participant. Prior to July 1, 1991, upon employment of any person, other than an elected officer as provided in s. 121.053, who has been retired under any state-administered retirement program, the employer shall pay retirement contributions in an amount equal to the unfunded actuarial liability portion of the employer contribution which would be required for regular members of the Florida Retirement System. Effective July 1, 1991, contributions shall be made as provided in s. 121.122 for retirees with renewed membership or subsection (13) with respect to DROP participants.

8. Any person who has previously retired and who is holding an elective public office or an appointment to an elective public office eligible for the Elected Officers' Class on or after July 1, 1990, shall be enrolled in the Florida Retirement System as provided in s. 121.053(1)(b) or, if holding an elective public office that does not qualify for the Elected

Officers' Class on or after July 1, 1991, shall be enrolled in the Florida Retirement System as provided in s. 121.122, and shall continue to receive retirement benefits as well as compensation for the elected officer's service for as long as he or she remains in elective office. However, any retired member who served in an elective office prior to July 1, 1990, suspended his or her retirement benefit, and had his or her Florida Retirement System membership reinstated shall, upon retirement from such office, have his or her retirement benefit recalculated to include the additional service and compensation earned.

9. Any person who is holding an elective public office which is covered by the Florida Retirement System and who is concurrently employed in nonelected covered employment may elect to retire while continuing employment in the elective public office, provided that he or she shall be required to terminate his or her nonelected covered employment. Any person who exercises this election shall receive his or her retirement benefits in addition to the compensation of the elective office without regard to the time limitations otherwise provided in this subsection. No person who seeks to exercise the provisions of this subparagraph, as the same existed prior to May 3, 1984, shall be deemed to be retired under those provisions, unless such person is eligible to retire under the provisions of this subparagraph, as amended by chapter 84-11, Laws of Florida.

10. The limitations of this paragraph apply to reemployment in any capacity with an "employer" as defined in s. 121.021(10), irrespective of the category of funds from which

the person is compensated.

11. Except as provided in subparagraph 12., an employing agency may reemploy a retired member as a firefighter or paramedic after the retired member has been retired for 1 calendar month, in accordance with s. 121.021(39). Any retired member who is reemployed within 1 calendar month after retirement shall void his or her application for retirement benefits. The employing agency reemploying such firefighter or paramedic is subject to the retirement ~~retired~~ contribution required in subparagraph 7. ~~8.~~ Reemployment of a retired firefighter or paramedic is limited to no more than 780 hours during the first 12 months of his or her retirement. Any retired member reemployed for more than 780 hours during the first 12 months of retirement shall give timely notice in writing to the employer and to the division of the date he or she will exceed the limitation. The division shall suspend his or her retirement benefits for the remainder of the first 12 months of retirement. Any person employed in violation of this subparagraph and any employing agency which knowingly employs or appoints such person without notifying the Division of Retirement to suspend retirement benefits shall be jointly and severally liable for reimbursement to the Retirement System Trust Fund of any benefits paid during the reemployment limitation period. To avoid liability, such employing agency shall have a written statement from the retiree that he or she is not retired from a state-administered retirement system. Any retirement benefits received by a retired member while reemployed in excess of 780 hours during the first 12 months of retirement shall be repaid

to the Retirement System Trust Fund, and retirement benefits shall remain suspended until repayment is made. Benefits suspended beyond the end of the retired member's first 12 months of retirement shall apply toward repayment of benefits received in violation of the 780-hour reemployment limitation.

12. An employing agency may reemploy a retired member who retired under the disability provisions of subparagraph (4)(b)2. as a law enforcement officer, firefighter, correctional officer, emergency medical technician, paramedic, or a community-based correctional probation officer after the retired member has been retired for 1 calendar month, in accordance with s. 121.021(39). Such retired member may not be reemployed with any employer in the position he or she held at the time of the disabling illness or injury. Any retired member who is reemployed within 1 calendar month after retirement shall void his or her application for retirement benefits. The employing agency reemploying such a member is subject to the retirement contribution required in subparagraph 7.

Section 4. Effective July 1, 2006, in order to fund the benefit improvements provided in s. 121.091, Florida Statutes, as amended by this act, the contribution rate that applies to the Special Risk Class of the defined benefit program of the Florida Retirement System shall be increased by 0.31 percentage points. This increase shall be in addition to all other changes to such contribution rates which may be enacted into law to take effect on that date. The Division of Statutory Revision is directed to adjust accordingly the contribution rates set forth in s. 121.71, Florida Statutes.

Section 5. This act shall take effect July 1, 2006.